APR 21 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1943.

No. 916.

BERKSHIRE KNITTING MILLS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

JOSEPH W. HENDERSON,
WELLINGTON M. BERTOLET,
GEORGE M. BRODHEAD, JR.,
Attorneys for Petitioner.

International, 236 Chestnut St., Phila. 6, Pa.

TABLE OF CONTENTS OF PETITION.

	Page
Summary and Statement of Matter Involved	1
Jurisdiction	8
Opinions Below	8
Questions Presented	8
Reasons for Granting Petition	9

TABLE OF CASES IN PETITION.

	Page
Berkshire Knitting Mills v. N. L. R. B., 121 F. (2d) 235	8
Berkshire Knitting Mills v. N. L. R. B., 130 F. (2d) 134	8
Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 229 (1938)	11
Morgan v. U. S., 304 U. S. 1 (1938)	9
N. L. R. B. v. Columbian Enameling & Stamping Co., 306 U. S. 292, 299 (1939)	11
N. L. R. B. v. Electric Vacuum Cleaner Co., Inc., 315 U. S. 685 (1942)	11
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292 (1937)	9

STATUTES CITED IN PETITION.

	Page
Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. Section 347 (a))	8
Section 10 (e) and (f) of the National Labor Relations Act, July 5, 1935, c. 372, § 10, 49 Stat. 453 (29 U. S. C. A. § 160 (e) and (f))	8

TABLE OF CONTENTS OF BRIEF.

Page

I. Petitioner Has Been Deprived of a Full, Fair, Prompt and Impartial Hearing 13

(a) The petitioner was not permitted to submit all its material evidence 14

(b) The petitioner was prejudiced by the conduct of the trial examiners 17

(c) Unwarranted delays of the Board deprived petitioner of a prompt hearing .. 19

II. The Finding of the Board That the Strike of 1936 Resulted From Unfair Labor Practices Is Unsupported by Substantial Evidence 20

III. The Board's Back Pay Order Should Not Include Time Lost Through Prolonged Delays of the Board and Branch 10 22

Conclusion 23

TABLE OF CASES IN BRIEF.

Page

Berkshire Knitting Mills v. N. L. R. B., 139 F. (2d) 134, 136 (C. C. A. 3rd, 1943) 15

Donnelly Garment Co. v. N. L. R. B., 123 F. (2d) 215 (C. C. A. 8th, 1942) 16, 19

Inland Steel Co. v. N. L. R. B., 109 F. (2d) 9, 20 (C. C. A. 7th, 1940) 13, 17, 18

Montgomery Ward & Co. v. N. L. R. B., 103 F. (2d) 147 (C. C. A. 8th, 1939) 18

Morgan v. United States, 304 U. S. 1, 14 (1938) 13

N. L. R. B. v. Crowe Coal Co., 104 F. (2d) 633 (C. C. A. 8th, 1939) 23

N. L. R. B. v. Electric Vacuum Cleaner Co., Inc., 315 U. S. 685 (1942) 22

N. L. R. B. v. National Casket Co., 107 F. (2d) 992 (C. C. A. 2nd, 1939) 19

N. L. R. B. v. Pheips, 136 F. (2d) 562 (C. C. A. 5th, 1943) 19, 20

N. L. R. B. v. Washington Dehydrated Food Co., 118 F. (2d) 980 (C. C. A. 9th, 1941) 18

Ohio Bell Telephone Company v. Public Utilities Commission, 301 U. S. 292 (1937) 13

Pittsburgh Plate Glass Co. v. N. L. R. B., 313 U. S. 146, 177 (1941) 15

STATUTE CITED IN BRIEF.

	Page
National Labor Relations Act, July 5, 1935, § 10 (c) . .	22

IN THE

Supreme Court of the United States.

No. .

October Term, 1943.

BERKSHIRE KNITTING MILLS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Berkshire Knitting Mills, prays that a writ of certiorari be issued to review a final decree of the United States Circuit Court of Appeals for the Third Circuit, entered on January 27, 1944, (XII, 4866-70)* granting the petition of the respondent, National Labor Relations Board (hereinafter called "Board") for the enforcement of its order, dated January 10, 1943, against petitioner, Berkshire Knitting Mills, and dismissing petitioner's petition to review and to set aside the Board's aforesaid order.

Summary and Statement of Matter Involved.

Charges that petitioner had engaged in and was engaged in unfair labor practices in violation of the Na-

* Unless otherwise indicated, Roman and Arabic numerals in parentheses refer to volume and page, respectively, of the printed record.

tional Labor Relations Act (hereinafter called the "Act") were filed with the Board by the American Federation of Hosiery Workers, Branch 10 (hereinafter called "Branch 10") on January 20, 1937. (I, 1, 3.)

Hearings were held from November 29, 1937, to February 1, 1938, at which the trial examiner failed to accord the petitioner a fair hearing. He relaxed the rules of evidence when counsel for the Board or Branch 10 examined witnesses, permitting Board's witness Saposs to read into the record wholly irrelevant matters (VI, 2530), but applied them strictly during examination by counsel for petitioner, (VI, 2543, 4). See also testimony at V, 2035, 2050 and 2058. He permitted Board's counsel to prompt his witnesses, and when documents were offered into evidence by the Board, he at times admitted them into evidence even without looking at them (II, 683, 4, 5; V, 2175). Counsel for petitioner repeatedly objected to methods used by Branch 10's counsel, who was permitted to cross-examine Board's witnesses on matters in no way related to Branch 10 (IV, 1518, 9) while counsel for the Intervenor was limited to the extent that the proceeding pertained to his association. (II, 608). His unwarranted bias was also reflected in his remarks during the examination of Frank Vecchio, Board's witness, (V, 2066, 7) and in permitting incitive speeches by counsel and the applauding by hand and mouth and the hissing and booing at the hearing (V, 2430, 1; VII, 3459).

The two principal issues at this hearing concerned the formation and administration of an independent union and the cause of the strike of 1936. The Board attempted to prove that the strike was caused and prolonged by isolated instances during a period from 1933 to 1937 and by direct evidence as to its cause, to wit, the strike letters, the testimony of Englehart, Ammarell, Payne, and petitioner's employees as well as its documentary evidence. The petitioner has consistently contended that the isolated instances of alleged unfair labor practices had no bearing on the question of the strike and that the aforesaid "direct evidence"

failed to substantiate any finding that the strike was caused by unfair labor practices and not economic factors.

Although oral argument was held before the Board on March 10, 1938, proposed findings of fact, proposed conclusions of law and proposed orders were not filed until more than a year later, namely, April 28, 1939. (I, 29, 117.)

On November 3, 1939, the Board filed its final decision. (I, 217.) It found (1) that the petitioner had dominated and interfered with and supported an independent union both at its formation and thereafter; (2) that the petitioner, during the period from 1933 to 1937, had restrained and coerced its employees in the exercise of rights guaranteed them under the Act in specific instances (which petitioner has always contended did not warrant the interpretation given by the Board or the order entered); and (3) that a prolonged and bitter strike, commencing in the fall of 1936, was caused by unfair labor practices and not from economic causes, as contended by petitioner. (I, 219-294.)

Based on these findings, the Board ordered (1) the disestablishment of said independent union and (2) the reinstatement, with back pay, of employees who had engaged in the aforesaid strike. (I, 295-299.)

Seven days later, November 10, 1939, petitioner filed in the Court below its petition for review contending, *inter alia,* (1) that it did not have a full, fair and impartial hearing, and (2) that under the evidence adduced, it had not been proved that the strike was caused by any unfair labor practice, but on the contrary, the evidence established that the strike had been called solely for economic reasons. (I, 305-322.)

While the case was awaiting argument before the Court below, the Special Committee of the House of Representatives Investigating Labor Board and Wagner Act (hereinafter also referred to as "Smith Committee") disclosed in its proceedings additional facts with respect to this case which showed that the petitioner did not have a full, fair and impartial hearing. The record of said congressional

investigation, so far as it related to Berkshire Knitting Mills, showed in specific detail that Edwin S. Smith, a member of the Board which entered the aforesaid order, and various subordinates of his, were actively biased and prejudiced in favor of the complaining union and against petitioner,—so much so that he and some of his subordinates made special efforts to see "that a case was made out" against the petitioner. The congressional investigation set forth in detail the aid which Smith and his subordinates furnished to the striking union in the conduct of a nationwide boycott and the exercise of economic pressure, including correspondence between Edwin S. Smith and Louis E. Kirstein, of William Filene & Sons Co., of Boston, Massachusetts (one of petitioner's largest customers) and John W. Edelman, Director of Research, American Federation of Hosiery Workers, as well as documents and data furnished to Louis E. Kirstein concerning petitioner and its current strike. Said congressional investigation further showed that the strike of 1936 was not caused by unfair labor practices, but solely for economic reasons, and that the Board, notwithstanding such evidence in its files, nevertheless withheld that evidence at the hearings in this case. The congressional investigation also showed that the Board and its agents, without notice to petitioner, agreed with the officers of and counsel for the striking union to delay the issuance of a complaint from January 20, 1937, to November 6, 1937; yet, after the filing of charges, the Board failed and neglected to confer with the petitioner in answer to its offer to coöperate. Said congressional investigation further showed that the reviewing attorney, Joseph B. Robinson, considered evidence dehors the record, and that the Secretary of the Board, after the close of the hearing but prior to the decision, discussed the case with counsel for the union as to what circuit should be selected in which to litigate the case. (I, 335-402.) The investigation disclosed other prejudicial acts against petitioner, all of which appear in petitioner's petition for leave to adduce additional evidence (I, 335-402) in which proper references are made to the ver-

batim Transcript of Proceedings before said Smith Committee and to which further reference is hereby made.

On May 9, 1940, the petitioner, having discovered the aforesaid additional evidence, filed its petition for leave to adduce said additional evidence, in which petition it set forth in full the nature and basis of said testimony, as well as the reason it had not been available theretofore. (I, 335-402.) On June 13, 1940, the Court below entered an order continuing the petition without prejudice until the hearing of the case upon the merits. (XII, 4801, 2.)

Thereafter the Court heard argument on April 7, 1941, on the petitioner's petition for review, as well as on its motion to adduce additional evidence, and the Court, on June 19, 1941, without deciding the merits of the case, filed its opinion granting petitioner's petition to adduce additional evidence with respect to the activities of Edwin S. Smith, but denied it with respect to other particulars. (XII, 4794-4800.) Exceptions were filed by petitioner with the Court below objecting to its failure to grant *in toto* petitioner's petition to adduce, which exceptions, among others, are relied on now in support of this petition for writ of certiorari. (XII, 4814-21.)

On July 21, 1941, the Court below in conformity with its opinion *supra* entered an order remanding the case to the Board and directing the Board to receive evidence concerning the activities of Edwin S. Smith. (XII, 4810.) The term of office of Edwin S. Smith as a Board member expired on August 26, 1941, before anything was done in connection with said order. Thereafter the Court below, on application of the Board and over objection of petitioner, entered a resettled order on October 14, 1941, remanding the case to the Board, with instructions to proceed without receiving additional evidence concerning Smith's activities, to withdraw its order dated November 3, 1939, and "to reconsider the case, make appropriate findings of fact, and to enter an appropriate order." (XII, 4813,4.) Exception was filed by petitioner to said resettled order. (XII, 4814-21.)

On October 29, 1941, the Board set aside its decision and order dated November 3, 1939. (XII, 4792, 3.)

The petitioner then filed a motion with the Board to adduce testimony concerning the alleged bias and actions of Edwin S. Smith and his associates, but that motion was also denied. (X, 4130, 1.)

Hearings were held on January 12, 14 and 15 of 1942, for the taking of testimony of Luther D. Adams (the Board having reversed its decision in which it had denied a subpœna duces tecum to said witness at the first hearing) and for the introduction of documentary evidence produced under subpœna, especially the minute book, to show the cause of the strike.

During the hearings, the petitioner, in addition to examining Luther D. Adams and such records as he produced, also offered to prove that, at conferences held between Regional Director Root, Isadore Katz, counsel for Branch 10, President Rieve and John W. Edelman, in the office of the Regional Director in Philadelphia, Pennsylvania, the said persons expressed their opinion that there was no unfair labor practice involved in the strike of October 1, 1936, on which they could base a charge of violation of the Act (X, 4309-18) and that as a result of investigations made by agents of the Board the petitioner had not committed any unfair labor practice and that the Federation had purposely persuaded the Board to delay filing the complaint in this case from the time when the charges were filed by the Federation on January 20, 1937 to November 7, 1937. All of these facts were contained in the certified copy of those portions of the verbatim record of the proceedings of the Special Committee of the House of Representatives Investigating Labor Board and Wagner Act which was attached to petitioner's aforesaid petition for leave to adduce additional evidence, *supra*. Moreover, at the conclusion of the second hearing the trial examiner refused to admit into evidence those separate and designated portions of the verbatim record of the aforesaid congressional inves-

tigation which are specifically set forth in Exhibit 14 offered by petitioner at second hearings (X, 4459, 60, 62, 63, 64; PX2* 14, 4565-76.)

At the hearings the trial examiner also permitted witness Adams to pick out any and all references in the minutes which the witness alone believed related to the strike, and refused petitioner's request that it be permitted to examine them or to have the trial examiner personally examine them. (X, 4171-78.) Moreover, the trial examiner admitted into evidence those portions of so-called minutes which were not signed and which were only copies. (X, 4477-99; X, 4500-23.)

On January 12, 1943, after argument on proposed findings of fact, proposed conclusions of law and proposed order, the Board filed its final decision, which in substance was merely a repetition of its previous decision of November 3, 1939. (XI, 4700-87.)

The decision of January 12, 1943, was appealed by petitioner to the Court below by a petition for review, and the Board then filed its petition for enforcement. (XII, 4821-50.)

In this appeal, the petitioner again contended, *inter alia,* that it had never had a full, fair and impartial hearing; that the strike of 1936 was caused by economic factors and not unfair labor practices; that, even if a back-pay order should be entered, it should not include time lost through the prolonged delays of the Board and the Union.

The Court below, after argument, dismissed the petitioner's petition to review, and on January 27, 1944, entered an enforcement order as requested by the Board, which final decree the petitioner now prays your Honorable Court to review on writ of certiorari. (XII, 4853-70.)

---

* Exhibits introduced in evidence at the first hearings in 1937-38 by petitioner are referred to as PX; by the Board as BX; by Intervenor as INX.

Exhibits introduced in evidence at the second hearings in 1942 by the petitioner are referred to as PX 2 and by the Board as BX 2.

Jurisdiction.

The final decree of the United States Circuit Court of Appeals for the Third Circuit was entered January 27, 1944. (XII, 4866-70.)

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. Section 347 (a)) and Section 10 (e) and (f) of the National Labor Relations Act, July 5, 1935, c. 372, § 10, 49 Stat. 453 (29 U. S. C. A. Section 160 (e) and (f)).

Opinions Below.

The findings of fact, conclusions of law and order of the Board filed on November 3, 1939, are reported in 17 N. L. R. B. 239.

The findings of fact, conclusions of law and order of the Board filed on January 10, 1943, are reported in 46 N. L. R. B. 955.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, written by Circuit Judge Goodrich and concurred in by Circuit Judges Maris and Jones, filed on June 19, 1941, is reported in *Berkshire Knitting Mills v. N. L. R. B.*, 121 F. (2d) 235.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, written by Circuit Judge Goodrich and concurred in by Circuit Judges Jones and McLaughlin, filed December 1, 1943, is reported in *Berkshire Knitting Mills v. N. L. R. B.*, 139 F. (2d) 134.

Questions Presented.

1. Did petitioner have a full, fair, prompt and impartial hearing on its alleged violations of the Act, as is guaranteed to it under the Constitution of the United States?

2. Is not the finding of the Board that the strike of 1936 was caused by unfair labor practices of petitioner and not for the purpose of exerting economic pressure on petitioner

for the adjustment of controversies unrelated to any alleged unfair labor practice unsupported by any substantial evidence?

3. May the Board include in a back-pay order time which has been lost through prolonged delays of the Board and of the striking union?

Reasons for Granting Petition.

The petition should be granted because the Court below, in affirming the decision of the Board and entering its enforcement order, has decided a federal question in a way in conflict with applicable decisions of your Honorable Court.

The petitioner has been denied a full, fair, prompt and impartial hearing as guaranteed to it under the Constitution of the United States. *Morgan v. U. S.*, 304 U. S. 1 (1938); *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292 (1937).

The petitioner's constitutional guarantee of a full, fair, prompt and impartial hearing has been violated in this case in the following particulars:

(1) The Board and the Court below refused to permit petitioner to adduce additional testimony developed by the Special Committee of the House of Representatives Investigating Labor Board and Wagner Act, which additional testimony would have shown the extent to which the bias and prejudice of Edwin S. Smith and some of his subordinates was present throughout the entire case from its inception, and would further show that, in the absence of a trial *de novo*, petitioner could never have a full, fair and impartial hearing.

(2) The petitioner has been denied a full, fair and impartial hearing by the action of the Court below in entering its order of October 14, 1941, in that it did not require the taking of testimony by the Board concerning the activity of Board member Edwin S. Smith. The mere fact that Smith's

term of office expired on August 26, 1941, which was after the date of the original order of July 21, 1941, directing the Board to take testimony concerning Smith's activities, but before any testimony was so taken (which failure, however, was not due to any delay of the petitioner or the Board) did not constitute any legal reason for the vacation of said original order and the substitution of a resettled order, which in effect whitewashed the alleged prejudicial activities of Smith and his subordinates because it did not require the taking of said testimony. The testimony relating to Smith's activities should have been taken; it should now be available to determine just what his activities were in this case, and until that testimony is made a part of this record, this petitioner has been deprived of its constitutional right of a fair hearing. By this procedure, the Court below, having found that petitioner did not have a fair hearing if the alleged activities of Smith were substantiated by the evidence to be adduced (XII, 4788-4800), could not correct the damage done to the petitioner by Board member Smith's activities, merely by ordering the Board, after Smith's term had expired, to withdraw its original order. The change in the Board's membership also could not eradicate the harm. The testimony concerning Board member Smith was vital and essential before any Board or Court could lawfully determine whether petitioner had the full, fair and impartial hearing to which it was entitled.

(3) The unwarranted bias and partiality of the trial examiner at the first hearing.

(4) The unwarranted delays of the Board in the prosecution of this case from its inception on January 20, 1937, to the filing of the second decision on January 12, 1943.

The decision of the Board, as affirmed by the enforcement decree of the Court below, insofar as it concerns the cause of the strike of 1936, is not founded upon competent,

legal evidence, and is in conflict with applicable decisions of your Honorable Court. The record is devoid of substantial evidence showing that the strike of 1936 was caused by unfair labor practices and not solely from economic reasons, as contended by petitioner. *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229 (1938); *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299 (1939).

The Court below has decided an important question of federal law, namely, the right of the Board to include in its back-pay order the time lost through prolonged delays of the Board and of the striking union, which question has not been specifically decided and should be settled by your Honorable Court. Cf. *N. L. R. B. v. Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685 (1942).

The petitioner's rights as guaranteed by the Constitution of the United States should be preserved. It is entitled to a full, fair, prompt and impartial hearing, and to be subjected only to such orders as are based upon competent legal evidence, and in accordance with the provisions of the Act.

BERKSHIRE KNITTING MILLS,

By JOSEPH W. HENDERSON,
WELLINGTON M. BERTOLET,
of Counsel.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

JOSEPH W. HENDERSON and WELLINGTON M. BERTOLET, being duly sworn according to law, depose and say that they are counsel for the petitioner herein and that the facts set forth in the foregoing petition are true and correct to the best of their knowledge, information and belief.

JOSEPH W. HENDERSON,
WELLINGTON M. BERTOLET.

Sworn to and subscribed before me this 20th day of April, A. D. 1944.

HARRISON G. KILDARE,
Notary Public.

(Seal)

My Commission expires January 25, 1947.

We hereby certify that we have examined the foregoing petition and that in our opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

JOSEPH W. HENDERSON,
WELLINGTON M. BERTOLET,
Counsel for Petitioner.